The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

ZANGO, INC., Plaintiff, v. PC TOOLS PTY, LTD., Defendant.	NO. 07-CV-00797 JCC MEMORANDUM OF ZANGO, INC. IN OPPOSITION TO PC TOOLS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISIDCTION AND IMPROPER VENUE

I. INTRODUCTION

In its order denying Zango's motion for temporary restraining order, the Court found a "reasonable probability that the Court has personal jurisdiction over Defendant due to [its] continuous and systemic business activity" in Washington. Dkt. #28 at 5. PC Tools does, indeed, have continuous and systematic contacts with this forum and thus the motion should be denied. PC Tools' contacts with the State of Washington include the following:

- Direct sales to Washington residents: Based on data provided by PC Tools itself, 700 Washington residents download PC Tools' Spyware Doctor every week. At a price of $29.95 per year for the base level of Spyware Doctor, this amounts to as much as $1.1 million in sales to Washington residents in the last year alone. Based

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on PC Tools' representation that it has distributed 100 million copies of Spyware Doctor, PC Tools' own data suggests that its sales to Washington residents could exceed $2 million.

- PC Tools' marketing contract with Washington resident: PC Tools pays Microsoft to be a "sponsored site" on MSN.com.
- PC Tools' contracts with Washington retailers: PC Tools contracts with at least two Washington-based corporations, Amazon.com and Zones, Inc., to sell Spyware Doctor on each retailer's web site.
- PC Tools' sales to Washington residents via other sales channels: PC Tools' software is sold in "brick and mortar" retail establishments like Fry's Electronics (which has a store in Renton, Washington) and Office Depot, and an unknown number of Washington residents have downloaded Spyware Doctor Starter Edition through Google Pack.

Zango also believes that discovery would likely show (1) that the contracts between PC Tools and Microsoft, Amazon.com and Zones have forum selection clauses in which PC Tools consents to suit in Washington and (2) additional proof of PC Tools' continuous and systematic business activity in Washington. To the extent this Court has any question regarding whether jurisdiction exists over PC Tools, Zango requests that this Court deny the motion and allow discovery on jurisdiction issues.

In addition, Zango's claims against PC Tools do arise out of harm experienced in Washington and thus this Court has specific jurisdiction over PC Tools. Zango has approximately 53,000 users (i.e., customers) in Washington. Zango has lost more than 143,000

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U.S. customers in just the past few months, which Zango attributes solely to the wrongful conduct of PC Tools and other anti-spyware providers. Zango's substantial Washington presence has been harmed just as much as its customer base in any other state. Moreover, PC Tools' wrongful conduct continued even after direct communications with Zango, and thus PC Tools knew or should have known that its actions were causing harm in Washington.

Ultimately, PC Tools' argument proves too much. The logical extension of PC Tools' position is that it is not subject to jurisdiction anywhere in the United States; indeed, the only alternative forum it suggests is Australia. Each argument it makes against Washington can be made with regard to other states. For a company that proudly proclaims it has distributed 100 million copies of its software to date, with millions of additional Americans downloading that software through not just PC Tools' web site but through the American-based and ubiquitous Google, it simply cannot be the case that this Court lacks personal jurisdiction merely because defendant conducts business through the Internet. Indeed, relevant cases have increasingly come to recognize that "e-tailers"—"electronic retailers"—like PC Tools are subject to the general jurisdiction of a state to the extent that they have significant sales to the residents of that state. PC Tools' attempt to escape that jurisdiction should be rebuffed and its present motion denied.

II. FACTS

A. Direct Sales by PC Tools to Washington Residents

PC Tools claims that "Spyware Doctor has been downloaded over 100 million times, and it continues to be downloaded approximately a million times every week." Dkt. #19 at 4:3-5. The Declaration of Neill Whitehead, submitted by PC Tools, asserts that Washington residents are responsible for .07% of the total downloads of Spyware Doctor from PC Tools' web site (which apparently does not include other sales channels). At that rate, there are 700 downloads

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of Spyware Doctor from PC Tools' own web site by Washington residents every week, or more than 36,000 per year. PC Tools' web site shows a price of $29.95 per year, thus representing sales of as much as $1.1 million in the last year to Washington residents.

Extrapolating that percentage of sales to Washington residents to the 100 million total downloads of Spyware Doctor, PC Tools' Washington sales could exceed $2 million since Spyware Doctor was first released in June 2004.

B. PC Tools Has Contracts With Washington Retailers

Spyware Doctor is sold on Amazon.com. Declaration of Michael Rosenberger, Ex. 1.[1] According to its web site, Amazon.com has its principal corporate office in Seattle and thus it is a citizen of Washington. Ex. 2. Undoubtedly, there is a contract between PC Tools and Amazon.com that governs Amazon.com's purchases of Spyware Doctor for resale.

Spyware Doctor is also sold on the Zones.com web site. Ex. 3. Zones, Inc. is a Washington corporation based in Auburn, Washington. Ex. 4.

Thus, PC Tools not only sells directly to Washington residents, but it also contracts with Washington citizens for the retail sale of Spyware Doctor to Washington users through other web sites. Again, Zango anticipates that discovery would show that PC Tools has written contracts with Amazon.com and Zones that likely have forum selection clauses in which PC Tools consents to suit in the State of Washington.

C. PC Tools' Marketing Contract With Microsoft

As we all know, Microsoft is a corporation with its worldwide headquarters in Redmond, Washington. Microsoft operates MSN.com. If one uses the MSN.com portal to search the web using the search term "spyware," PC Tools is the first "sponsored site" that appears in the search

[1] Unless otherwise noted, all exhibits subsequently cited are submitted with the Rosenberger Declaration.

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results. Ex. 5. Sponsored sites link searchers to the web sites of companies, such as PC Tools, that pay MSN.com for prioritized placement in search results. Paying to be a sponsored site is a form of Internet-based marketing.

Again, Zango anticipates that discovery will show the existence of a written contract between MSN.com and PC Tools that contains a forum selection clause requiring disputes between the two companies to be litigated in the State of Washington.

D. PC Tools Sells Spyware Doctor to Washington Residents Through "Brick and Mortar" Retail Stores

The Fry's Electronics store in Renton, a major retailer of consumer electronics, sells boxes of PC Tools' Spyware Doctor for $29.99; Fry's also sells PC Tools' Registry Mechanic, another piece of software, also for $29.99. Declaration of Gregg Berretta ¶ 2. Spyware Doctor can also be purchased at Office Depot stores in the State of Washington. *Id.*

E. Thousands of Zango's Washington Customers Have Been Affected by PC Tools' Spyware Doctor Software

During the past month, Zango has had approximately 53,000 customers in Washington state. Declaration of Derek Immekus ¶ 2. Zango believes that PC Tools' Spyware Doctor, and a few other anti-spyware programs, have wrongfully damaged Zango's customer base. Between March 2007 and June 2007, Zango lost approximately 143,000 customers in the United States alone. Declaration of Tom Allan ¶ 2. There are no known market-based reasons for this decline. *Id.* Zango believes that its substantial Washington presence has been harmed to the same extent as its customer base in other states. *Id.* ¶ 3.

Thus, Zango's claims against PC Tools are based in part on harm suffered by Zango in the State of Washington.

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III. ARGUMENT

Zango alleges that PC Tools' actions have caused Zango harm in every state in which Zango does business (which is every state except Alaska). Zango's claim thus arises out of PC Tools' contacts with Washington, which contacts in turn give rise to specific jurisdiction. However, this Court need not conduct a specific jurisdiction analysis because the quantum of business done by PC Tools is sufficient to render it subject to general jurisdiction.

Assuming this Court does not hold an evidentiary hearing and rules on the written submissions, Zango need only make a prima facie showing of jurisdiction and this Court must resolve any disputed facts in Zango's favor.

> [W]hen a district court acts on a defendant's motion to dismiss without holding an evidentiary hearing, the plaintiff need make only a prima facie showing of jurisdictional facts to withstand the motion to dismiss. That is, the plaintiff need only demonstrate facts that if true would support jurisdiction over the defendant. "Where not directly controverted, plaintiff's version of the facts is taken as true for the purposes of a 12(b)(2) motion to dismiss. Likewise, conflicts between the facts contained in the parties' affidavits must be resolved in [plaintiffs'] favor for purposes of deciding whether a prima facie case for personal jurisdiction exists."

Coremetrics, Inc. v. AtomicPark.com, LLC, 370 F. Supp. 2d 1013, 1015-16 (N.D. Cal. 2005) (citations omitted).

Washington's long-arm statute, RCW 4.28.185, governs personal jurisdiction. This statute "is coextensive with the outer limits of federal due process." *Expedia, Inc. v. Reservationsystem.com, Inc.*, 2006 U.S. Dist. Lexis 90848 at *6 (W.D. Wash. 2006), citing *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1405 (9th Cir. 1994). "Thus, this Court need only determine whether jurisdiction in this district comports with due process." *Id.*

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A. This Court Has General Jurisdiction Over PC Tools

1. PC Tools' Continuous and Systematic Contacts With Washington

General jurisdiction exists where a defendant engages in "substantial" or "continuous and systematic" contacts with the forum state. *Id.* PC Tools' contacts meet this standard based on the following.

First, PC Tools makes many direct sales to Washington residents, which sales likely exceed $1 million and perhaps even $2 million. Although PC Tools apparently contends that this Court cannot exercise jurisdiction because the percentage of downloads in Washington is relatively small, the percentage figure is less important that the actual volume.

> *Percentage of a company's sales in a given state are generally irrelevant.* Instead, our focus is on whether a defendant's activity in the forum state is "continuous and systematic." *Helicopteros*, 466 U.S. at 414. Many companies conduct millions of dollars in sales worldwide yet only do a small percentage of their sales in any one state. *E.g., L.L. Bean, Inc.*, 341 F.3d at 1074 (sales in California for L.L. Bean, Inc. only accounted for six percent of its total sales). However, our relevant inquiry is not whether the percentage of a company's contacts is substantial for that company; rather, *our inquiry focuses on whether the company's contacts are substantial for the forum.*

Lakin v. Prudential Secs., 348 F.3d 704, 709-11 (8th Cir. 2003) (emphasis added). Further, each purchase by a Washington resident marks the beginning of *continuous* contacts initiated by PC Tools with Washington residents. As PC Tools itself acknowledges, it communicates with its customers through frequent updates to the Spyware Doctor software. Dkt. 22 ¶¶ 8, 24 (discussing PC Tools' "updating" its database and software).

Second, PC Tools has unknown, but significant, sales through other retail outlets in Washington, such as Fry's Electronics and Office Depot.

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Third, PC Tools has contracts with Washington-based retailers, Amazon.com and Zones, for the purpose of selling Spyware Doctor.

Fourth, PC Tools has a contractual relationship with Microsoft, through MSN.com, for purposes of marketing Spyware Doctor.

Undoubtedly, discovery would unearth additional facts establishing a deep, consistent and lucrative presence by PC Tools in Washington.

2. Courts Recognize General Jurisdiction over "E-tailers" Such as PC Tools

Several district courts have recognized that continuous and substantial sales by an "e-tailer" in the forum state justify the exercise of general jurisdiction. In *Expedia, Inc. v. Reservationsystem.com, Inc.*, 2006 U.S. Dist. Lexis 90848, Judge Martinez of this Court denied a motion to dismiss for lack of personal jurisdiction, finding that general jurisdiction existed based on defendant's contacts with Washington that appear no greater, and may be less significant, than are present here. Judge Martinez noted that "the total bookings from guests living in Washington is less than one percent of Bookit's total bookings." *Id.* at n.2. It is unclear whether the defendant had other contractual relationships with Washington business, as PC Tools does. Nevertheless:

> While only a small portion of Bookit's revenue and reservations may actually come from Washington, that doesn't change the fact that Bookit's sales through its website are intentional and entirely within Bookit's control, and sales do actually occur in this state. . . .
>
> Here, while it is admittedly a close question, the Court finds that exercising personal jurisdiction is constitutional and appropriate in light of these facts. Because the Court finds that general jurisdiction exists, it is not necessary to determine whether it can also exercise specific jurisdiction.

Id. at *8-9.

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In another recent case, a California court similarly found that general jurisdiction existed over an "e-tailer" like PC Tools. The plaintiff in the case was a California corporation suing for breach of contract. Defendant was a Wisconsin LLC that was an online retailer of software. The court denied defendant's motion to dismiss for lack of jurisdiction, reasoning that:

> First, AtomicPark admits that it is an "e-tailer, which essentially means [it is] a retailer on line." In other words, AtomicPark basically runs a "virtual store." A virtual store is largely designed so as to approximate physical presence in a forum; for example, consumers may window shop by browsing the website and actual sales are made directly to consumers online. Also, as is evident from AtomicPark's website (of which the Court takes judicial notice, see Fed. R. Evid. 201), consumers may contact AtomicPark for information and real-time assistance via the Internet or a toll-free number. In short, AtomicPark provides virtually all the same services that would be provided by a "bricks and mortar" software dealer. . . .
>
> Second, AtomicPark advertises its services over the Internet, including through Yahoo, a well-known search engine. Although there is no evidence that California consumers are directly targeted through this Internet advertising, there is no evidence that they are excluded either. At the very least, although AtomicPark may not have targeted California consumers specifically, it has reached out across the nation to promote its services.
>
> Third, AtomicPark has actually made sales to California consumers through its virtual store, and, even more important, the volume of sales made to California consumers -- both in absolute numbers and as a percentage of total sales -- is substantial. Over a ten-month period, from April 2003 to February 2004, California consumers brought more than $3.3 million worth of products from AtomicPark, or 14.71 percent of AtomicPark's total sales.

Coremetrics, 370 F. Supp. 2d at 1021-22 (citations omitted).

Each of these factors is equally applicable to PC Tools. While the amount of sales by PC Tools in Washington is not as great as that of AtomicPark in California, it is still very substantial. Applying the percentage of Washington-based downloads to all 100 million

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downloads of Spyware Doctor suggested by PC Tools (namely .07%), *Washington residents have acquired approximately 70,000 copies of defendant's software.* Moreover, here we have the additional factor of PC Tools having entered into contracts with Washington businesses for further distribution of defendant's software.

Similarly, in Nutraceutical *Corp. v. Vita-Cost.com, Inc.*, 2006 U.S. Dist. Lexis 33762 (D. Utah May 25, 2006), the court held it proper to exercise general jurisdiction where defendant's interactive web site allowed Utah residents to purchase defendant's products directly:

> Vitacost's website allows an internet user to purchase Vitacost's products online. Consumers can search for specific products; place items in virtual shopping carts; view product descriptions, price and pictures; sign up for EZShip, Vitacost's automatic shipment program to reorder products; and purchase products through "Check-Out" by providing credit card and shipping information. The court concludes that Vitacost purposefully and deliberately set up and operated a website with a high level of interactivity, which encourages customers accessing its website to order its products from which Vitacost receives economic benefits from the product sales. As such, such Vitacost's website falls within the sliding scale category of website that allows a defendant to "do business" and "enter into contracts with residents of foreign jurisdictions over the Internet." As Nutraceutical has established that Vitacost's website constitutes a commercial web site, Nutraceutical has demonstrated that Vitacost has purposefully availed itself of the privilege of doing business in the jurisdiction.

Id. at *14-15. As in *Neutraceutical*, PC Tools' web site allows Washington consumers to place items in a virtual "shopping cart" and to make purchases via credit card.

Finally, Zango notes the persuasive authority of the Ninth Circuit's holding that retailer L.L. Bean is subject to personal jurisdiction in California given that the company "maintains a highly interactive, as opposed to 'passive,' web-site from which very large numbers of California

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consumers regularly make purchases and interact with L.L. Bean sales representatives." *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1078 (9th Cir. 2003). This opinion is persuasive, rather than binding, because it was vacated when it was noted for rehearing en banc and the case settled before an en banc ruling issued. In a subsequent ruling in the same case, one Ninth Circuit judge noted "[t]hat decision no longer has the force of law, but it is a clear statement by three judges of this court that, in their view, there is general jurisdiction over L.L. Bean in California." *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1142 (9th Cir. 2005) (Fletcher, W., J., dissenting). Zango notes that the Ninth Circuit itself continues to favorably cite the opinion. *See, e.g., Oja v. United States Army Corps of Eng'rs*, 440 F.3d 1122, 1128 n.3 (9th Cir. 2006).

B. Given That PC Tools Does Substantial Business with Washington Residents, That Zango's Claims Relate to PC Tools' Interaction with Washington Residents, and That PC Tools Cannot Make a Compelling Case that Jurisdiction in Washington Would be Unreasonable, the Court is on Solid Ground in Exercising Specific Personal Jurisdiction Over PC Tools

Because the Court may exercise general jurisdiction over PC Tools, it need not engage in a specific jurisdiction analysis. *Expedia*, 2006 U.S. Dist. Lexis 90848, at *9. However, ample support exists for the exercise of specific personal jurisdiction. Specific personal jurisdiction requires that:

> (1) the non-resident defendant must purposefully direct his activity or consummate a transaction with the forum or a resident thereof; or purposefully avail himself of the privilege of conducting activities in the forum; (2) the claim must arise out of or relate to the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable. Plaintiff bears the burden of proving the first two prongs of the test, and if it can do so, the burden shifts to Defendant to present a "compelling case" that jurisdiction would be unreasonable.

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Qwest Comms. Int'l, Inc. v. Sonny Corp., 2006 U.S. Dist. Lexis 29832, at *3-4 (W.D. Wash. May 15, 2006) (citing *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801-02 (9th Cir. 2004)); *see also Gordon v. Virtumundo, Inc.*, 2006 U.S. Dist. Lexis 34095, at *9 (May 24, 2006) (citing *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270 (9th Cir. 1995)).

1. PC Tools Purposefully Avails Itself of Washington Because it Realizes the Commercial Benefits of Substantial Numbers of Transactions With Washington Over its Interactive Website

Where a plaintiff can show that a defendant operates an interactive website whereon it consummates transactions with Washington residents, the plaintiff has met the purposeful availment prong. *Qwest*, 2006 U.S. Dist. Lexis 29832, at *4-7 (applying the *Zippo* "sliding scale" test for active/passive websites announced in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997)); *see also Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997).

In *Qwest*, defendant's contacts with Washington were far fewer than here—just three (3) sales—yet Judge Pechman found that defendant purposefully availed itself of the privilege of doing business in Washington:

> Defendant used its website to advertise, sell, and ship its product into customers' Washington homes. Therefore, Defendant operates an interactive website that exchanges substantial commercial information with Washington residents. *Cf. Cybersell*, 130 F.3d at 419-20. . . . . Not only did Defendant operate an interactive--not passive--website, it engaged in the "something more" that is required to support jurisdiction: it intentionally made sales to Washington residents and shipped its product here. Defendant therefore purposefully availed itself of Washington.

Qwest, at *6.

PC Tools' own submissions to the Court show that Washington residents download 700 copies of Spyware Doctor per week from defendant's web site; using PC Tools' own figure of

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100 million downloads since June 2004, Washington residents have downloaded a total of 70,000 copies of Spyware Doctor. Zango thus satisfies the purposeful availment prong.

To the extent the purposeful availment prong depends on satisfying the "effects test," the test is met here. In language from *Qwest* that is on point, this Court stated that the defendant's conduct also "satisfies the 'effects doctrine' because it (1) was intentional, (2) was expressly aimed at Washington in that the website lists Washington as an available shipping location and Defendant intentionally shipped its product into this state, and (3) allegedly caused harm here." *Qwest*, at *6, citing *Rio Properties, Inc. v. Rio Int'l Interlink,* 284 F.3d 1007, 1019-20 (9th Cir 2002).

That the two first prongs of the effects test are satisfied is obvious. In selling software to Washington residents, PC Tools (1) did intentional acts that were (2) aimed at the forum. As to the third prong (harm), defendant's knowledge that Zango would suffer harm is borne out by the extensive pre-suit communications between the parties, in which Zango notified defendant of the harm being suffered by Zango. Decl. of Gregg Berretta, Dkt # 7, ¶¶ 9, 16. Moreover, upon such notice, PC Tools knew it was interfering with Zango's customer relationships in all states in which Zango does business, including Washington. "If a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state." *Yahoo! Inc. v. La Ligue Contre Le Racisme*, 433 F.3d 1199, 1207 (9th Cir. 2006).

2. Zango's Claims Arise Out Of or Relate to PC Tools' Washington-Related Activities

Zango has had more than 53,000 customers in Washington during the last 30 days, and Zango claims that its customer base is being wrongfully reduced in Washington by PC Tools.

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Immekus decl; Allan decl. Additionally, of course, Zango is a Washington resident and it is suffering harm in the forum.

This prong of the test is predicated upon the nature of a plaintiff's claim and is satisfied upon establishing that "but for Defendant's utilization of its website to pass its product into Washington, Plaintiff would not have allegedly suffered harm *in Washington*." Qwest, at *7 (emphasis added) (applying *Ziegler v. Indian River Country*, 64 F.3d 470, 474 (9th Cir. 1995)). As stated in *Yahoo!*, Zango need not demonstrate that all or even most harm occurred in Washington. Zango has shown that PC Tools' interference with Zango's relationship with its Washington customers would not have occurred but for PC Tools' use of its web site to sell software to Washington residents.

3. PC Tools Has Not Presented a "Compelling Case" That the Court's Exercise of Specific Jurisdiction Would be Unreasonable

Whether PC Tools can establish a "compelling case" that specific jurisdiction would be unreasonable depends on the application of a seven-factor test:

(1) the extent of its forum-related activities;
(2) the burden of defending in the forum;
(3) the extent of conflict with the sovereignty of the defendant's state;
(4) the interest of forum state in adjudicating the dispute;
(5) the most efficient judicial resolution of the dispute;
(6) the importance to of the forum the plaintiff; and
(7) the existence of an alternative forum.

See Qwest, at *7-8. These factors weigh heavily in Zango's favor.

a. Extent of Forum-Related Activities

PC Tools' activities in Washington are substantial. Indeed, as discussed above, they support the exercise of general jurisdiction over PC Tools. *See also Gordon*, 2006 U.S. Dist. Lexis 34095, at *22 (noting factor weighs in plaintiff's favor where (as here) defendant engages

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in acts aimed at Washington residents and derives revenue from business activity in Washington).

b. Burden of Defending in Forum

PC Tools cannot demonstrate any meaningful burden (i.e., one distinct from the burdens that any commercial litigant faces) in having to defend this case in this Court. Defendant's briefing establishes that it has affiliates doing business in different parts of the world, including in California. *See* Dkt. #18 ¶ 3. The PC Tools' website identifies the company as a "global leader," with a "global presence," making its products "available right throughout the world, to over 196 countries," with employees in the United States, and with offices in the United States, United Kingdom, Ireland, and Australia. *See* Rosenberger Decl., Ex. 6. Since it appears that PC Tools can do business and avail itself of revenue-generating opportunities in "over 196 countries," the relative burden in having to defend this lawsuit in one of these countries (a country it has an office and employees in) seems particularly slight—and defendant has not demonstrated anything to the contrary.[2]

c. Interest of the Australian Government

PC Tools has not identified a meaningful interest of the Australian Government. It states (without any citation) that "[t]he Australian Government has an interest in ensuring that unreasonable restrictions are not placed on its resident corporations' abilities to conduct business . . . ." Dkt. #17 at 9:20-22. This only begs the question of reasonableness and is equally true for

[2] This Court has further noted that "[i]t is unsurprising that a non-resident defendant would prefer to litigate an action in the state in which its principal place of business is located. However, such a preference. . . is insufficient to establish the existence of a substantial burden on Defendants if they must litigate in Washington." *Gordon*, 2006 U.S. Dist. Lexis 34095, at *23. The same is true here.

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any jurisdiction providing a home to commercial entities. At best for PC Tools, this factor is neutral.

d. Interest of the Forum

PC Tools acknowledges that Washington has "an interest" in protecting its corporate citizens. Dkt. #17 at 10:4-10. That interest, in fact, is "substantial." *Qwest*, at *9 ("Washington has a substantial interest in adjudicating this dispute because Plaintiff is a Washington resident that alleges tortious injury due to the conduct of another.").

e. Efficiency of the Forum Adjudication

"The most efficient judicial resolution of the controversy focuses on the availability of evidence, but no longer weighs as heavily because of modern advances in transportation and communication." *Qwest*, at *10 (citing *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1323-24 (9th Cir. 1998)). Moreover, PC Tools wrongly contends that discovery will be centered in Australia. In fact, the evidence concerning the effect of Spyware Doctor—which is what this case is about—is here in Washington. Zango also notes that defendant has already offered the declaration of a purported expert—an *American*. Dkt. # 20. Thus, as in *Qwest*, this factor is neutral or weighs in Zango's favor.

f. The Importance of the Forum to Zango

Plaintiff's operations are headquartered in Washington. As such, this factor weighs in its favor, as PC Tools concedes. *See Qwest*, at *10; Dkt. #17 at 10.

g. Existence of an Alternative Forum

Where there are *many* alternative forums, this factor has been said to favor the defendant. *See, e.g., Qwest*, 2006 U.S. Dist. LEXIS 29832, at *10; Dkt. #17 at 10. Here, PC Tools only

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suggests one, Australia, despite the fact that PC Tools does business in "over 196 countries" including the United States, where it has a California office and employees. Ex. 6.

As a practical matter, litigating in Australia is not an available option to Zango and, if forced to do so, would prevent Zango from having meaningful access to judicial relief against PC Tools. Zango has no office in Australia. Berretta Decl. ¶ 3. In contrast, PC Tools not only has an American affiliate, but it generates a huge amount of business through the American market, as demonstrated by the inclusion of Spyware Doctor in the American-owned "Google Pack."

Balancing the above factors, it becomes clear that PC Tools has not, and cannot, present a "compelling case" that jurisdiction is unreasonable. *See also Gordon*, 2006 U.S. Dist. Lexis 34095, at *10 (stating, in Internet tort case, that "personal jurisdiction may attach if an out-of-forum defendant merely engages in conduct aimed at, and having effect in, the situs state") (citing *Ziegler*, 64 F.3d at 473).

C. At Minimum, This Court Should Deny the Personal Jurisdiction Motion and Allow Discovery

Zango respectfully contends that the foregoing discussion establishes this Court's jurisdiction over defendant. However, if the Court is not convinced and still questions whether personal jurisdiction exists, Zango requests that defendant's motion be denied to permit discovery on jurisdiction issues. The Ninth Circuit has held that discovery "should ordinarily be granted where 'pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary.'" *Butcher's Union Local No. 498 v. SDC Inv., Inc*, 788 F.2d 535, 540 (9th Cir. 1986), citing *Data Disc, Inc. v. Systems Technology Assocs., Inc.*, 557 F.2d 1280, 1285 n.1 (9th Cir. 1977); *see also Siderman de Blake v. Republic of*

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Argentina, 965 F.2d 699, 713 (9th Cir. 1992) ("To the extent that the jurisdictional facts are disputed on remand, the parties should be allowed to conduct discovery for the limited purpose of establishing jurisdictional facts before the claims can be dismissed.").

Having done no discovery at all to date, Zango has identified the likely existence of contractual relationships between PC Tools and major Washington corporations. Zango believes that formal discovery will uncover additional contacts between PC Tools and the forum state, and that PC Tools has repeatedly consented to suit in Washington as a *quid pro quo* for the privilege of conducting business with Washington corporations. Consistent with Ninth Circuit authority, Zango should be permitted to discover all of PC Tools' business relationships in Washington before a jurisdictional motion to dismiss is granted.

D. The Forum Non Conveniens Motion Should Be Denied

The Ninth Circuit has said:

> Even when an adequate alternative forum exists, we will not disturb the plaintiff's original choice of forum "unless the 'private interest' and the 'public interest' factors ***strongly favor***" dismissal. As we explained recently, a plaintiff need not select the optimal forum for his claim, but only a forum that is not so oppressive and vexatious to the defendant "as to be out of proportion to plaintiff's convenience."

Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163, 1180 (9th Cir. 2006) (emphasis added).

In its structural characteristics, this case is really no different than a product liability case against a foreign car manufacturer, such as Volkswagen. Sure, some witnesses and evidence may be located in Germany, but this does not deprive plaintiff of its choice of forum. Should the Court believe a forum non conveniens argument to have any possible merit, Zango similarly requests the opportunity to do discovery focused on the relevant factors. An examination of

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those factors, however, suggests that this argument may be rejected without the need for discovery.

1. "Private Factors"

The "private factors" favor Zango or, at most, are neutral. There is no factor that "strongly favors" dismissal.

Residence of Witnesses: As Zango has insisted from the outset, this case is much less about the "characterization" of Zango software than it is about PC Tools' conduct: the *effect* of PC Tools' software on Zango in precluding new customers and in decimating without notice the functionality of Zango software already installed on users' computers. All or most witnesses on that issue are Zango employees. Moreover, as noted above, defendant's own expert is an American, as is Zango's expert.

Access to Evidence: Litigating in this Court presents no problem. All evidence is in control of the parties, and can be produced in accordance with the Federal Rules. This is not a situation in which critical evidence is in the possession of foreign third parties who are beyond this Court's subpoena power. *Cf. Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1146-1147 (9th Cir. 2001) ("[M]any of the New Zealand documents and witnesses are under the control of the New Zealand government or [third-party] Ansett. The district court does not have the power to order the production or appearance of such evidence and witnesses.").

The Forum's Convenience to the Litigants: Zango respectfully contends that while litigating in a foreign country is never *convenient*, the *inconvenience* is far less for PC Tools than it would be for Zango. In word and deed, PC Tools has set out to be a "global leader," and its global ambitions are spearheaded by its marketing efforts in the United States through companies such as Google, Amazon.com, and MSN. It has an office here and employees here. It is a

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reasonable assumption that most, or at least a substantial percentage, of its business is in America. PC Tools should not be heard to complain when it is summoned to court in a market it has so assiduously cultivated. In contrast, Zango has no physical presence in Australia. In sum, this Court is a less inconvenient forum to PC Tools than an Australian forum would be to Zango.

2. Public Factors

The "public factors" also strongly favor Zango.

Local Interest: PC Tools concedes Washington has an interest in protecting its citizens. It then argues that Washington has no interest in "tying its hands" for the benefit of Zango. Not surprisingly, Zango fervently disagrees. Zango's problems in the past occurred largely due to misuse of its software by third-party business affiliates, a problem that Zango corrected—at great cost—more than 18 months ago. Zango is a thriving Bellevue-based business with 225 employees, has been cited as one of Washington's fastest-growing private companies and is regularly listed as one of the best places in Washington to work. With Zango, customers get to view content in exchange for seeing occasional advertisements (one every 10 minutes or so) relevant to their Internet searching. This business (akin to network television models, where programming is paid for by advertisements) is a win-win for consumers and Zango (and content providers and advertisers, too). PC Tools' steadfast refusal to amend its database and software to meet this reality is damaging Zango, its Washington employees and residents throughout the state who are Zango customers (or who would be, but for PC Tools' wrongful conduct). This state has a strong interest in seeing Zango's rights vindicated.

Choice of Law: PC Tools' conclusory claim that the "parties' relationship" is centered in Australia is unsupported and without merit. This suit arises from: (1) sales by defendant in Washington; (2) harm to Washington residents and Zango, both in Washington; (3) a defendant's

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actions, which defendant has an office in America. While some decisions relevant to the suit were made in Australia, it is as inconceivable that a Washington court would deem plaintiff's claim to be governed by Australian law as it is that a Washington court would deem a product liability claim against Volkswagen to be governed by German law.

In sum, the private and public factors favor Zango. At the very least, they are neutral, which is insufficient to grant a forum non conveniens motion. If any doubt remains, Zango requests the opportunity to do discovery directed to the forum non conveniens factors.

E. Venue is Proper Here

PC Tools fails to inform the Court that "[a]n alien may be sued in any district." 28 U.S.C. § 1391(d). PC Tools is an Australian corporation, and thus venue is proper.

Moreover, even if that exception did not apply, a corporation is a resident of any district in which personal jurisdiction exists. *Id.* at § 1391(c). Hence, venue is always proper as to a sole corporate defendant under the general venue provision, § 1391(a), when the court has personal jurisdiction over the defendant. Because this Court has personal jurisdiction over PC Tools, PC Tools is a resident of this district and venue is proper.

IV. CONCLUSION

For the reasons stated above, Zango respectfully requests that defendant's motion to dismiss be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following persons:

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